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IN THE
Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF REINSURANCE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF REINSURANCE ASSOCIATION OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The Reinsurance Association of America hereby moves, pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in support of Petitioners. The motion is necessitated by Respondents' refusal to consent.

The Reinsurance Association of America ("RAA") is the leading association of reinsurers in the United States. A non-profit trade association incorporated in the District of Columbia, the RAA represents eighteen member companies which are either domestic U.S. companies or U.S. branches of foreign reinsurers authorized and licensed in at least one

state. Together, RAA member companies write approximately two thirds of all reinsurance assumed by U.S. property and casualty reinsurers.

The RAA has a long-standing interest in participating as amicus curiae in cases across the country that affect the reinsurance industry. For example, the RAA has filed briefs of amicus curiae on the issue of reinsurance arbitration in numerous cases including, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) and *Marathon Oil Co. v.Ruhrgas*, 145 F.3d 211 (5th Cir. 1998). The RAA has also addressed the issue of preemption and the McCarran-Ferguson Act specifically as amicus curiae before this Court in *Humana v. Forsyth*, 525 U.S. 299 (1999). In each case the RAA was able to offer a unique perspective to assist the court in its resolution of the issues presented.

As stated in the accompanying brief, the resolution of this case is of great significance to not only the RAA and its members, but to the entire insurance industry. This Court's interpretation of the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.* (1994), and in particular, the scope and meaning of the phrase "for the purpose of regulating the business of insurance," will help resolve a currently uncertain and divisive state of the law in the lower courts. Because the application of the Federal Arbitration Act to the RAA's members will often turn on the interplay of state statutes and the McCarran-Ferguson Act, the Court's interpretation of, and standards for applying these acts here may very significantly define the scope of the RAA's members' permissible use of arbitration as a dispute resolution mechanism.

The Reinsurance Association of America believes its brief will provide the Court with relevant legal and factual information not already brought to the Court's attention by

the parties, particularly with respect to the broad significance of the question presented and a proper construction of the McCarran-Ferguson Act.

Based on the foregoing, the RAA respectfully requests this Court grant its Motion for Leave to File a Brief of *Amicus Curiae* in support of the Petitioners.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The RAA is a non-profit trade association incorporated in the District of Columbia, having its principal place of business in the District. The eighteen member companies who make up the RAA are principally engaged in the business of reinsuring property and casualty risks underwritten by primary insurance companies. These members are either domestic U.S. companies or U.S. branches of foreign reinsurers. Together, RAA member companies write approximately two thirds of all reinsurance assumed by U.S. property and casualty reinsurers. The RAA's principal purpose is to promote the interests of the property-casualty reinsurance industry and its members before Congress and state legislatures, federal and state regulatory authorities, courts and the general public. Members of the RAA act as reinsureds (or "cedents"), reinsurers and retrocessionaires in the insurance industry.

The resolution of this case is of great significance to the RAA and its members. This Court's interpretation of the McCarran-Ferguson Act of 1945, and in particular, its interaction with the Federal Arbitration Act will help resolve the currently uncertain and divisive state of the law in the lower courts. Because the application of the Federal Arbitration Act to the RAA's members will often turn on the interplay of state statutes and the McCarran-Ferguson Act, the Court's interpretation of, and standards for applying these acts here may very significantly define the scope of the RAA's members' permissible use of arbitration as a dispute resolution mechanism.[1]

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[1] Respondents refused to provide consent to the filing of this brief. Accordingly, *amicus curiae* has submitted a motion for leave to file the brief. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The resolution of the question presented – whether a state law restricting the use of arbitration in agreements between patients and health care providers is "reverse preempted" by the McCarran-Ferguson Act – will have a tremendous impact on the insurance industry. Proper consideration must be given to such an important question in order to uphold the federal policy of encouraging arbitration. The Decision of the Colorado Supreme Court creates a perilous precedent that will harm this federal policy as well as the ability to determine, with a uniform standard, when the application of McCarran-Ferguson is appropriate in transactions only incidentally involving insurance. Allowing the overly broad interpretation of the Colorado Supreme Court on the question of whether state restrictions on arbitration concern "regulating the business of insurance" will further confuse the issue of arbitration in the insurance context and could lead to virtually any state law related to insurance, however tenuously, preempting federal law pursuant to the McCarran-Ferguson Act.

The RAA's members have a vital interest in the enforcement of their arbitration agreements. Because arbitration avoids the costliness and delays of litigation and permits the parties to take advantage of specialists familiar with insurance industry custom and usage, it is common for reinsurance contracts to provide that all disputes between the reinsurer and insurer must be resolved through arbitration.

ARGUMENT

I. GRANTING THE PETITION IS IMPORTANT BECAUSE OF THE NEED FOR THIS COURT TO UPHOLD THE FEDERAL POLICY OF ENCOURAGING ARBITRATION IN THE INSURANCE INDUSTRY

A. A BROAD VIEW OF THE FEDERAL ARBITRATION ACT IS IMPERATIVE TO CONGRESS' PURPOSE IN ENACTING THE LAW

The decision of the Colorado Supreme Court circumvents the important federal policies embodied in the FAA. Its broad application of the McCarran-Ferguson Act allows state laws to displace the federal policy favoring the enforcement of arbitration agreements embodied in the FAA.

The history of Congress' ardent support for arbitration is evident in the laws it has passed supporting alternative dispute resolution. This unbending favor for arbitration became distinct with the passage of the Federal Arbitration Act (the "FAA") in 1925[2], then with the United States' accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and adoption of its implementing legislation in 1970. Specifically, in supporting the Convention, Congress indicated its intent to broadly support international arbitrations as swifter, more efficient ways to decide

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[2] The United States Arbitration Act, Pub. L. No. 25-401, 43 Stat. 883 (1925); 9 U.S.C. §§ 1-16 (2002). "Convention" in 9 U.S.C. § 205 refers to the Convention on the Recognition of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6957, 330 U.N.T.S. 38 [1970], reprinted following 9 U.S.C. § 201, and the term shall have the same meaning in this brief.

multinational commercial disputes.[3] Likewise, the legislative history indicates a strong Congressional support for the Convention and its reciprocal recognition of arbitration agreements and awards internationally and its belief that these tools are necessary for the United States to compete fully in the global economy.[4]

Historically, Congress has taken a broad view of arbitration laws. But, even before Congress recognized the benefits of arbitration over litigation, American courts "frequently criticized the rule [that arbitration was against public policy] and recognized its illogical nature and the injustice which result[ed] from it." H. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). The 68th Congress did away with the presumption against enforcement of arbitration agreements by passing the Federal Arbitration Act in 1925. From that point on, Congress required American courts to recognize and enforce valid arbitration agreements. Congress viewed enactment of the FAA, in part, as crucial to the smooth operation of domestic commerce and as evidence of an appreciation for the value of producing relatively swift, economical dispute resolution. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). Indeed the drafters of the FAA had also

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[3] *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc.*, 760 F. Supp. 1036 (E.D.N.Y. 1991) (noting the Convention's purpose of encouraging enforcement of commercial arbitrations and the federal policy in favor of arbitral dispute resolution).

[4] As this Court has said, the federal policy favoring arbitration "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Island Territory of Curacao v. Solidtron Devices*, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

specifically considered consumer needs: "the Act, by avoiding the delay and expense of litigation, will appeal to big business and little business alike ... corporate interests [and] individuals." *Id.*

Congress provided in the Federal Arbitration Act (FAA) that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002). In addition, the FAA expresses a strong national policy in support of arbitration, and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1983); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir. 1998).

Faced with increasing international trade, Congress eventually moved to work with other nations to enforce worldwide the same arbitration principles behind the FAA. Thus, under the auspices of the United Nations, the United States negotiated the Convention on the Recognition of Foreign Arbitral Awards in May and June of 1958. Leonard V. Quigley, *Convention on Foreign Arbitral Awards* 58 A.B.A. J. 821 (1972).

Under the Convention, any signatory country is now required to enforce or recognize arbitral awards issued in the United States as valid and binding; all signatory countries must now use the same, summary enforcement procedures for arbitration agreements that are found in the Convention; businesses from signatory countries, including the U.S., have foreknowledge of procedures and certainty that external courts will enforce their arbitration agreements; and all these benefits result in the achievement of smoother dispute

resolution in international commerce, as businesses may have more confidence in planning their foreign transactions.

As explained by this Court, the goal of the Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate are observed . . . in signatory countries." *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 538 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974)). Courts may effectuate the goals of the Convention and Congress' long standing support of arbitration only through the broad enforcement of arbitration rights.

Ironically, the Convention was designed to bring the ideals embodied in the FAA to the international community, yet the application of the FAA to domestic disputes remains uncertain, as states continue to seek to limit its use, particularly in the insurance industry.

The FAA was enacted specifically to overcome a historic judicial hostility to the enforcement of private arbitration agreements. *Allied Bruce-Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995). The FAA's central and overriding mandate is that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with the rules applicable to other contractual terms. *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989); 9 U.S.C. § 2. By virtue of its enactment, this Court has held that "state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminix*, 513 U.S. at 272. Yet, according to the Colorado Supreme Court, a state court may apply a state tort reform statute aimed at medical malpractice that invalidates arbitration agreements simply because of its tangential

relation to insurance. The Colorado Supreme Court's decision in this case directly undermines the "substantial federal concern for the enforcement of arbitration agreements," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 at 728-29 (1996), and as explained herein, contributes to a growing confusion among the lower courts over the scope and application of the McCarran-Ferguson Act.

Granting the petition in this case will allow the Court to again underscore the federal policy encouraging arbitration and its relation to state statutes which run counter to this policy.

B. THE INSURANCE INDUSTRY HAS HISTORICALLY RELIED ON THIS COURT'S BROAD VIEW OF THE APPLICABILITY OF THE FAA IN CHOOSING DISPUTE RESOLUTION MECHANISMS WHILE STRUCTURING ITS BUSINESS AGREEMENTS.

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). In fact, agreements to arbitrate disputes can be found as far back as the Roman Empire. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L. J. 595, 597 (1928). And arbitration as we know it in the United States today is rooted in these European sources.

A product of this history, arbitration has long been the dispute resolution mechanism of choice for the reinsurance industry, and historically, arbitration clauses have been included in reinsurance contracts. John S. Butler & Robert M. Merkin, *Reinsurance Law* (rev. ed. 1993)

C.5.1-01; R.L. Carter, *Reinsurance* 146 (1979). For example, written arbitration clauses can be found in continental European reinsurance agreements in the first half of the 19th century and earlier. K. Gerathewohl, et al, *Reinsurance Principles and Practice, Vol. I*, at 716 (1980). An 1895 reinsurance agreement involving Munich Reinsurance Company Limited of Munich contained a clause that read:

> In the event of any difference hereafter arising between the contracting parties with reference to any transaction under this treaty the same shall be referred to two Arbitrators . . . *RAA Manual for the Resolution of Reinsurance Disputes* 8 n.17 (1997).

Despite wide support today, courts have not always viewed arbitration agreements in a favorable light. Previously, some courts invalidated the arbitration clause as being contrary to public policy, though others went as far as to suggest that the entire contract might be unenforceable, since the arbitration clause evidenced the parties' lack of intent to create a legal relationship.[5] This attitude has changed, however, with the continued recognition of the value of arbitration and the increasingly international character of reinsurance. *Id.* The change in point of view by United States courts has been so extensive that this Court stopped an attempt by the California legislature to invalidate agreements to arbitrate claims under that State's Franchise

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[5] Linda Lasley, "So You Think You're Going to Arbitrate: Contract Wording and the Parties Expectations," *Journal of the Independent Reinsurance Underwriters' Assoc.*, 11-12; *See also*, Barry C. Silverman, *Voluntary Commercial Arbitration*, 25 J. Marshall L. Rev. 309, 313-317 (1992).

Investment Law. *Southerland Corp. v. Keating*, 465 U.S. 1 (1984). Insurance liquidators also are no longer immune from demands for arbitration. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

Parties to reinsurance contracts continue to utilize arbitration clauses because traditionally arbitration works to more efficiently resolve disputes. Moreover, as noted above, federal policy strongly favors arbitration.[6] This policy stems in part from the conclusion that arbitration is a "socially desirable instrumentality for the settlement of disputes outside the . . . beleaguered courts." *Sibley v. Tandy Corp.*, 547 F.2d 286, 287 (5th Cir. 1977).

Arbitration avoids the costliness and delays of litigation, and permits the parties to take advantage of specialists familiar with industry custom and usage.[7] This point is especially important when one considers the international aspects of reinsurance. Today, U.S. insurers cede reinsurance risks to more than 2,200 reinsurers in over

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6 *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Const. Co.*, 460 U.S. 1 (1983) ("[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements").

7 *Prudential Lines v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). For example, compare the almost eight years of litigation the liquidator of the Union Indemnity Insurance Company had to go through before being able to start the collection process against creditors, e.g., *Michigan National Bank v. American Centennial Ins. Co.*, 521 N.Y.S.2d 617 (N.Y. Sup. Ct. 1987), with the four months it took Transit Insurance Company's liquidator to obtain a ruling and take an appeal in an arbitration with one of Transit's alien reinsurers. *Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F.Supp. 1346 (S.D.N.Y. 1987).

95 jurisdictions outside the United States.[8] These reinsurers from outside the United States account for approximately 46% of all reinsurance in the United States. U.S. insurers heavily rely on the worldwide reinsurance market because U.S. reinsurers lack the necessary capacity to reinsure all the U.S. risk.[9] The reinsurance industry utilizes arbitration to avoid the expense and complexity of international litigation.

Because of the importance of arbitration to complex business arrangements present in the international insurance community as well as the need for the ability to confidently implement domestic arbitration agreements under U.S. law, the Court should grant the petition in order to clearly articulate the standard to be applied in determining reverse preemption as it results from application of the McCarran-Ferguson Act.

II. DETERMINING PREEMPTION UNDER THE FAA AND MCCARRAN-FERGUSON REQUIRES ONE CLEAR STANDARD

A. Resolution of this Case Will Determine the Scope of Preemption for an Entire Industry.

The issue of preemption and reverse preemption looms large in the insurance arena. Without clear direction from this Court, the conflicted state of the law will continue,

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[8] Reinsurance Association of America, *Alien Reinsurance in the U.S. Market* 2 (2003).

[9] William C. Marcoux, Alien Reinsurers, in *Reinsurance: Fundamentals and New Challenges* 142 (Ruth Gastel ed., Insurance Information Institute 1995).

causing confusion for both policyholders and insurers alike. An in-depth discussion of the conflicts and confusion that exist in the lower courts with regard to the standard to be applied in determining reverse preemption under the first clause of McCarran-Ferguson is presented in the Petition for a Writ of Certiorari. In addition to the arguments below, the RAA would like to draw the Court's attention to and support the arguments of the Petitioners on this issue.

The Colorado Supreme Court held that the arbitration restrictions found in a state statute, the Health Care Availability Act, Colo. Rev. Stat. § 13-64-403, ("HCAA"), conflicted with the FAA. Pet. App. 12a. Thus, unless the statute was otherwise saved from preemption, the FAA would control and bar the statute's enforcement.

The Respondent asserted, and the Colorado Supreme Court agreed, that the FAA was reverse-preempted by the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§1011-1015, so as to render the parties' arbitration agreement unenforceable. The McCarran-Ferguson Act is designed to clear the way for state laws regulating the business of insurance, by displacing federal laws that conflict with such state laws. But McCarran-Ferguson applies only in "the narrow range of cases involving state regulation of the insurance industry, [and] permits a state law to reverse preempt a federal statute only if: (1) the federal statute does not specifically relate to the "business of insurance;" (2) the state law was enacted for the "purpose of regulating the business of insurance;" and (3) the federal statute operates to "invalidate, impair, or supersede" the state law. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998).

In determining whether the statue in question was enacted "for the purpose of regulating the business of

insurance," the Colorado Supreme Court focused on two U.S. Supreme Court decisions – *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) and *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993). Combining the reasoning of these two cases, the Colorado Supreme Court found that the HCAA directly regulated health insurance contracts and furthered the interests of patients (who the court considered policyholders since it determined HMOs acted as health care insurers).

The Colorado Supreme Court's reasoning in finding reverse preemption is inoperably broad, overly simplistic, ignores the plain meaning of McCarran, and is at odds with the fundamental principles of federalism that underlie both McCarran and this Court's well-established jurisprudence regarding the relationship between state and federal law. More specifically, the Colorado Supreme Court's interpretation of the McCarran-Ferguson Act as covering any law that "furthers the interests of policyholders" is so broad as to effectively apply to any state law that affects insurance generally, but may have no significant connection to the business of insurance. Further, the Colorado Supreme Court's restrictive view of the protective elements of the FAA cannot be squared with either Congressional intent or this Court's prior interpretations of both McCarran and other statutes.

This Court has repeated " '[o]ver and over' " that " ' [i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 917 n.5 (1998) (quoting *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States* v. *Heirs of Boisdore*, 8 How. 113, 122, 12 L. Ed. 1009 (1849)). The object and policy of the Federal

Arbitration Act is to ensure the validity and enforcement of arbitration agreements. Congress made that purpose very clear at the time it enacted the FAA; by enacting section 2, Congress sought to place arbitration agreements "upon the same footing as other contracts where [they] belong. H. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

The new test developed by the Colorado Supreme Court – considering whether state laws "directly regulate contracts between health insurance policyholders and their insurers" and "further the interests of these policyholders" – is so broad as to completely swallow federal preemption under the first clause of section 2(b) of McCarran-Ferguson. Under such a standard, almost any state law of general applicability could be said to be "for the purpose of regulating the business of insurance." This interpretation would nearly eviscerate the policy embodied in the FAA and has no obvious relationship to the language of McCarran-Ferguson.

In addition, the HCAA bears resemblance to many other restrictive statutes whose scope is not limited to the insurance industry. However, unlike the Colorado Supreme Court, most other courts have not saved these statutes from FAA preemption under McCarran-Ferguson. *American Bankers Ins. Co. of Fla. v. Crawford*, 757 So.2d 1125 (Ala. 1999); *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2nd Cir. 1969). This case is a particularly important one for this Court to use in resolving this conflict, because the Colorado Supreme Court's construction of McCarran-Ferguson's savings clause is so broad as to make federal preemption unavailable.

Because arbitration is of great importance to the insurance industry, the determination of preemption under

the FAA and reverse-preemption under McCarran-Ferguson will continue to complicate and confuse the use of arbitration until this Court clarifies the standards to be used in deciding whether state laws restricting the use of arbitration are enforceable against insurers.

B. THE COLORADO SUPREME COURT DECISION PROVIDES NO GUIDANCE IN APPLYING STANDARDS FOR DETERMINING QUESTIONS OF PREEMPTION.

As explained above, the Colorado Supreme Court devised a new test to determine what constitutes the "business of insurance" under McCarran-Ferguson. However, since this interpretation covers any law that "furthers the interests of policyholders," its application is so broad as to create no meaningful standard at all.

The Colorado Supreme Court's holding compounds the well-established and growing conflict among the lower courts over the applicability of this Court's decision in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) to cases arising under the first clause of the McCarran-Ferguson Act. In *Pireno*, an insurer utilized a peer review committee to resolve policyholder claims involving chiropractor services. Applying a now-familiar three-part test—which looks to whether the practice (i) "has the effect of transferring or spreading a policyholder's risk," (ii) is an integral part of the policy relationship," and (iii) "is limited to entities within the insurance industry"—this Court held that the claims review process was not part of the "business of insurance." *Id.* at 129. The Court emphasized that the "challenged peer review arrangement [wa]s logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies" *id.* at 130, and that the insurer's "use of the [peer review committee] as an aid to its decisionmaking process [wa]s a

matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid," *id.* at 132.

Colorado's Health Care Availability Act, and in particular the provisions concerning enforceability of arbitration agreements between patients and health care providers, is similarly unconnected to the transfer of risk accomplished by insurance policies. The use of arbitration is also not "integral" to the policy relationship in a manner that is unique to the business of insurance; arbitration is a method of dispute resolution that is important to many business arrangements, but like other laws of general applicability, the availability of arbitration does not pertain to any of the aspects of insurance that distinguish a policy relationship from other commercial agreements. Further, as the trial court in this case addressed, the HCCA does not meet the third factor set out in *Pireno* since the statute is not limited to entities within the insurance industry.

The Colorado Supreme Court's refusal to consider the *Pireno* factors brings to light the continuing conflict in applying any one standard to preemption cases. Two circuits have held that the *Pireno* test does not apply in first clause preemption cases. *Doe v. Northwest Bank Minnesota*, 107 F.3d 1297 (8th Cir. 1977); *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998). Two other circuits have held that the *Pireno* test should apply. *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995); *Ambrose v. Blue Coss & Blue Shield*, 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996). Still two other circuits have said the *Pireno* test may apply. *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998); *Blackfeet National Bank v. Nelson*, 171 F.3d 1237 (11th Cir. 1999). The court in *Blackfeet* opined that the *Pireno* test applied in that case

because: "[w]e cannot imagine that the 'business of insurance' could have two different meanings in the same statutory section. *Id.* at 1246, n. 3.

The Court should grant the petition in this case in order to reconcile the varying decisions across the circuits and determine a uniform standard for applying the McCarran-Ferguson Act.

C. WITHOUT A CLEARLY ARTICULATED FEDERAL STANDARD FOR PREEMPTION, STATE COURTS WILL BE FREE TO IMPOSE ONEROUS RESTRICTIONS ON ARBITRATION

Determining whether the FAA or the McCarran-Ferguson Act controls in this case will help identify what constitutes the "business of insurance." In the case at bar, at issue are contractual arrangements between medical groups, individual physicians and health plans. In the future, countless situations involving contractually mandated arbitration could be envisioned.

In fact, the issue often arises in the context of insurance receiverships – also invoking the issue of McCarran-Ferguson reverse preemption. Receivers repeatedly seek to override reinsurance contract arbitration clauses by claiming that state receivership courts have exlcusive jurisdiction over all receivership matters. However, reinsurers have consistently objected to the idea of exclusive jurisdiction of receivership courts and typically seek to remove suits against them to federal district courts, requesting that the federal courts compel the receiver to

arbitrate pursuant to the terms of the reinsurance agreement. The trend of recent decisions clearly favors reinsurers.[10]

Especially significant is this Court's decision in *Quackenbush*. In the Mission Insurance insolvency, the liquidator – the California Insurance Department – sued Allstate and others in the liquidation court for reinsurance recoverables. Allstate removed to federal district court and moved for resolution of the dispute by arbitration. When the Supreme Court finally ruled after various appeals, the decision favored reinsurers by ensuring the right of access to federal courts for the resolution of contract disputes and by reaffirming the ability to arbitrate disputes according to reinsurance agreements.

In cases brought by receivers against reinsurers, as debtors, reinsurers have uniformly been successful in enforcing their contractual arbitration rights. State and federal courts have compelled arbitration against receivers in

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[10] *See, e.g., Quackenbush v. Allstate*, 517 U.S. 706 (1996); *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Grode v. Mutual Fire*, 8 F.3d 953 (3rd Cir. 1993); *Costle v. Fremont Indemnity Co.*, 839 F.Supp. 265 (D. Vt. 1993) (liquidator stands in insolvent company's shoes, and absent state law or liquidation order requiring proceeding in "judicial forum", FAA requires dispute to be resolved in arbitration in accordance with contract); *Ainsworth v. Allstate Ins. Co.*, 634 F.Supp. 52 (W.D. Mo. 1985) ("Where the arbitration clause is contained in a contract involving interstate commerce... it is enforceable under the FAA regardless of any state laws to the contrary.") *See also, Fabe v. Columbus Ins. Co.*, 587 N.E.2d 966 (Ohio Ct. App. 1990); *Selcke v. New England Ins. Co.*, 995 F.2d 688 (7th Cir. 1993); *Schacht v. Beacon Ins. Co*, 742 F.2d 386 (7th Cir. 1984); *Phillips v. Lincoln National Health & Cas. Ins. Co.*, 774 F.Supp. 1297 (D.Colo. 1991); *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992); *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998).

New York (*Bernstein (as Receiver for Ambassador) and Corcoran (as Rehabilitator of Horizon) v. Centaur*, 606 F.Supp. 98 (S.D.N.Y. 1984); *Corcoran (as Liquidator of Union Indemnity) v. AIG Multi-Line Syndicate, Inc., et al.*, 539 N.Y.S.2d 630 (N.Y. Sup. Ct. 1989)), Missouri (*Ainsworth v. Allstate,* 634 F.Supp. 52 (W.D.Mo. 1985)), Ohio (*Fabe v. Columbus*, 68 Ohio App.3d 226 (Ct. App. Ohio 1990)), Colorado (*Phillips (as Receiver of Healthcare United) v. Lincoln National*, 774 F.Supp. 1297 (D. Colo. 1991)), Pennsylvania (*Foster (as Rehabilitator of Mutual Fire) v. Philadelphia Manufacturers*, 592 A.2d 131 (Pa. Commw. Ct. 1990). *Reconsideration denied* (1991)), Illinois (*Schact (as Rehabilitator of Centaur) v. Hartford Fire*, 1991 WL 171377 (N.D. Ill. 1991)), California (*Garamendi v. Caldwell*, 1992 WL 203827 (C.D. Cal. 1992)) Texas (*Everest Reinsurance Company v. Howard*, 950 S.W.2d 800 (Tex. App. 1997)) and Vermont (*Costle (as Liquidator of Ambassador) v. Fremont Indemnity Co.*, 839 F.Supp. 265 (D. Vt. 1993)). Additionally, U.S. Courts of Appeal have compelled arbitration in the Third, Seventh and Tenth Circuits.[11] Finally, this Court has found that federal courts should not abstain from hearing actions brought by receivers to simply collect potential assets, like reinsurance. In *Quackenbush* this Court found that such actions do not interfere with comprehensive state regulatory schemes. In making such findings the Court has undercut the thrust of receivers' primary objections to arbitration and paved the way for future courts to continue the trend of what has

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[11] *Schacht v. Beacon*, 742 F.2d 386 (7th Cir. 1984); *Selcke (as Rehabilitator of Centaur) v. New England Insurance Co.*, 995 F.2d 688 (7th Cir. 1993); *Grode v. Mutual Fire (in Rehabilitation) v. Brittany Insurance Co.*, 8 F.3d 953 (7th Cir. 1993); *Bennett (as Liquidator of Glacier General) v. Liberty National*, 968 F.2d 969 (9th Cir. 1992); *Quackenbush (as Liquidator of Mission) v. Allstate*, 121 F.3d 1372 (9th Cir. 1997).

already become the clear majority view. Notwithstanding this trend and this Court's ruling in *Quackenbush*, some states, like New York, continue to question the enforceability of arbitration agreements. [12]

Nevertheless, despite this progress, the standards governing use of arbitration in the insurance industry, and the enforceability of state laws that restrict its use, remain uncertain. The Colorado Supreme Court decision adds to this uncertainty and is inconsistent with prior precedent of this Court. Lacking a clear standard for determining reverse preemption under McCarran-Ferguson, states continue to attempt to erode the enforceability of arbitration agreements, as receivers have attempted to do, unsuccessfully in the context of insurance receiverships. This Court should end the confusion by addressing dispositively the question presented here of whether state laws that restrict the use of arbitration are laws that regulate the business of insurance, as the court below held, or instead are merely laws that regulate dispute resolution with no particular nexus to the business of insurance, as petitioners rightly contend, and hence are preempted by the FAA. The application of the FAA and McCarran-Ferguson to determine preemption, and therefore the enforceability of arbitration agreements, should not be determined unilaterally by any one state either judicially pronouncing what is and is not "the business of insurance," or by using the term "insurance" in an anti-arbitration statute

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[12] *Knickerbocker Agency v. Holz*, 149 N.E. 2d 885 (1958); *Washburn v. Corcoran*, 643 F. Supp. 554. (S.D.N.Y. 1986); *Corcoran v. Ardra Ins. Co.*, 657 F. Supp. 1223 (S.D.N.Y. 1987); *Union Indemnity, et. al. v. American Centennial Ins. Co.*, 521 N.Y.S. 2d 617 (Sup. Ct. N.Y. County 1987); *Corcoran v. Ardra Ins. Co. Ltd.*, 156 A.D. 2d 70, 553 N.Y.S.2d 695 (1990); *Stephens v. American International Ins. Co., et al.*, 66 F.3d 41 (2nd Cir. 1995).

in order to statutorily create an artificial nexus. Such a determination must be made by a uniform federal standard.

CONCLUSION

The Reinsurance Association of America respectfully urges the Court to grant the petition for a writ of certiorari as sought by petitioners in this case.

Respectfully submitted,

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